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Nos. 84-495 and 84-1379

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

Supreme Court, U.S.
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RICHARD THORNBURGH, *et al.*,
*Appellants*

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*,
*Appellees*

EUGENE F. DIAMOND, *et al.*,
*Appellants*

v.

ALLAN G. CHARLES, *et al.*,
*Appellees*

**On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits**

## BRIEF FOR THE NATIONAL ABORTION RIGHTS ACTION LEAGUE; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICANS FOR DEMOCRATIC ACTION; COALITION OF LABOR UNION WOMEN; COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS; DISABILITY RIGHTS EDUCATION AND DEFENSE FUND; NATIONAL BLACK WOMEN'S HEALTH PROJECT; NATIONAL CAMPAIGN TO RESTORE ABORTION FUNDING; NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC. OF THE UNITED STATES OF AMERICA; NATIONAL WOMEN'S CONFERENCE COMMITTEE; NATIONAL WOMEN'S HEALTH NETWORK; NATIONAL WOMEN'S POLITICAL CAUCUS; U.S. STUDENT ASSOCIATION; VOTERS FOR CHOICE; WOMEN'S EQUITY ACTION LEAGUE; WOMEN USA; AND YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE UNITED STATES OF AMERICA NATIONAL BOARD AS AMICI CURIAE IN SUPPORT OF APPELLEES

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## BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ABORTION RIGHTS ACTION LEAGUE, ET AL.

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### INTEREST OF AMICI

The NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL) is a national organization dedicated to keeping abortion legal, safe and accessible. It has more than 150,000 national members plus 33 affiliates with their own membership. NARAL spearheaded the May 1985 "Abortion Rights: Silent No More" action which gave voice to the millions of American women who have chosen to have abortions.

The AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW), a national organization of over

193,000 college educated women, is strongly committed to achieving legal, social, educational, and economic equity for women. AAUW has a longstanding commitment to ensuring a woman's right to choose to have an abortion as an essential element of her reproductive freedom.

AMERICANS FOR DEMOCRATIC ACTION (ADA) is an independent liberal organization, founded in 1947, which has members in every state. ADA policy, which is set by its members is that abortion is a personal and medical decision which should not be restricted by government action.

The COALITION OF LABOR UNION WOMEN is a membership organization which represents the interests of the 7 million union women in the United States. The right of a woman to control her own destiny, both economic and social, is seriously impaired if the state intervenes in this most personal of choices.

The COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS (CDRR), an issue committee of the Coalition for the Medical Rights of Women, is a grassroots organization based in San Francisco with 1000 members throughout California and several other states. CDRR believes that everyone has the right to make responsible, uncoerced decisions about parenting and sexuality, and this necessarily includes the right to choose abortion.

The DISABILITY RIGHTS EDUCATION AND DEFENSE FUND is a national disability civil rights organization dedicated to securing equal citizenship for disabled Americans. The right of disabled people to lead independent lives includes the right of disabled women to choose to have an abortion or to have children and to be free from involuntary sterilization.

The NATIONAL BLACK WOMEN'S HEALTH PROJECT is a health, education and advocacy organization which works to improve the quality of life for black women. Its work is based on the belief that black women,

including poor black women, should have access to health services which reduce infant mortality and produce healthy babies as well as access to abortion services so that black women have a full range of reproductive choices.

The NATIONAL CAMPAIGN TO RESTORE ABORTION FUNDING (NCRAF) is a newly developed national network reflecting the perspective of minority and working-class women. NCRAF seeks to guarantee abortion rights for all women through the restoration of Medicaid funding for abortion which was cut by the Hyde Amendment in 1976.

The NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUB'S INC. OF THE UNITED STATES OF AMERICA (BPW/USA), founded in 1919, has a membership of 150,000 individuals and 3500 local organizations, and represents the interests of working women. BPW/USA opposes any human life amendments, attempts to define when life begins and attempts to overturn *Roe v. Wade*.

The NATIONAL WOMEN'S CONFERENCE COMMITTEE (NWCC), 470 members appointed under Public Law 94-167 to implement the 1977 National Plan of Action, represents 90 national organizations and delegations from every state and territory. NWCC supports the implementation of the National Plan of Action plank on reproductive freedom.

The NATIONAL WOMEN'S HEALTH NETWORK (NWHN) is a public interest organization whose membership, comprised of 10,000 individuals and 400 organizations representing 500,000 women, seeks to give women a voice in the health care system in the United States. NWHN supports women's rights to have complete control over their bodies, which must include the right to make decisions to use contraception, to bear children or to end a pregnancy.

The NATIONAL WOMEN'S POLITICAL CAUCUS (NWPC), a bipartisan organization, with 77,000 members nationwide, seeks to increase the influence and number of women in the public policy process at every level. The NWPC fully supports reproductive freedom and in particular a woman's right to choose to have a safe and legal abortion.

The U.S. STUDENT ASSOCIATION (USSA) is a student advocacy service, representing over 3 million students and over 400 universities and colleges around the United States. USSA is in favor of a woman's right to choose and of reproductive freedom because an unwanted pregnancy can restrict a woman's access to higher education.

VOTERS FOR CHOICE (VFC) is a national independent pro-choice political action committee solely dedicated to keeping abortion safe, legal and accessible for all women. VFC's goal is to ensure the election of progressive, pro-choice candidates to Congress through provisions of financial and technical assistance.

The WOMEN'S EQUITY ACTION LEAGUE (WEAL) is a national membership organization committed to the economic development and advancement of all women. WEAL supports reproductive freedom as a right for all women, and recognizes that right as intimately tied to the capacity of women to gain economic security.

WOMEN USA is a communications network and organization serving women throughout the United States, and working to expand the participation of women in citizenship decision making. Women USA supports reproductive freedom as a fundamental human right as basic as freedom of speech and the press, and as important as the principal of separation of church and state.

The YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE UNITED STATES OF AMERICA (YWCA) National Board has supported, since 1967, the right of

women to choose abortion. The YWCA has one million members nationwide and 700 local branches.

## SUMMARY OF ARGUMENT

*Amici* submit this brief to place the realities of abortion in women's lives before this Court and to urge this Court to reaffirm *Roe v. Wade*, 410 U.S. 113 (1973). Despite the narrow questions raised by the two cases before this Court, *Thornburgh v. American College of Obstetricians and Gynecologists*, 53 U.S.L.W. 3739 (U.S. Apr. 15, 1985) (No. 84-495) and *Diamond v. Charles*, 53 U.S.L.W. 3824 (U.S. May 20, 1985) (No. 84-1379), the Acting U.S. Solicitor General has filed an amicus brief asking this Court to overrule *Roe v. Wade*. The circumstances of women's lives and women's compelling reasons for choosing to have abortions elucidate the strong Constitutional foundations for this Court's decision in *Roe v. Wade*.

In addition to presenting social science and medical data, *Amici* present excerpts from some of the thousands of letters received in response to the national campaign "Abortion Rights: Silent No More."[1] As part of this action, people wrote letters describing why they or people they knew chose to have abortions. The letters came from people from all walks of life. Many writers described themselves in their letters:

> I am a Christian. I have a college degree and am a registered nurse. (L-40)

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[1] Some of the letters have been published. *See* 131 Cong. Rec. H3586-3602, E2367. 2372 (daily ed. May 22, 1985); 131 Cong. Rec. S6892-93, E2411-12 (daily ed. May 23, 1985); Detroit Free Press, July 7, 1985 (Sunday Magazine), at 6-11; Southern Feminist Press, July-August 1985, at 8-9; and others will be published in a book currently being negotiated by the National Abortion Rights Action League. For the Court's convenience the letters from which excerpts have been taken are reproduced in a volume lodged with this brief. Letters or documents which appear in this volume are designated as "L". The letters and excerpts have been quoted and reproduced as sent, without corrections in punctuation, grammar or spelling.

I am a 32 year old Black female. I am a Baptist by faith. . . . (L-41)

I was 30 years old, childless and facing a divorce. (L-42)

I was a nice Irish Catholic girl dating a nice Irish boy from Queens. (L-43)

I was born in Puerto Rico, and I grew up and went to school there . . . (L-26)

My name is Frank Mendiola, I am not an expert on abortion. . . . (L-4)

I have been married 38 years; I am the mother of 5 wanted and thoroughly loved children; grandmother of 3 . . . (L-2)

Then, I was a young lieutenant in the regular army. (L-20)[2]

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[2] Many who wrote wanted to share their personal experience but felt that they could do so only if they were able to preserve their privacy. Thus many of the authors signed only with a first name, a zip code or the pseudonym "Jane Roe" in honor of the plaintiff in *Roe v. Wade*. This Court has recognized that women may be deterred from asserting their rights if they are forced to make their abortion decisions public. This Court has found standing for plaintiffs who appeared pseudonymously, *see, e.g., Roe v. Wade*, 410 U.S. at 124; and *Doe v. Bolton*, 410 U.S. 179, 187 (1973), and has held that physicians have standing to assert the interests of their patients, in part because a woman may be deterred from asserting her own rights "by a desire to protect the very privacy of her decision from the publicity of a court suit." *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (opinion of Blackmun, J.). *See also, City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 440 n. 30 (1983).

The rise in clinic violence and harassment of women seeking abortions makes the need for privacy even greater. One letter writer explained: "I apologize for not signing my name but I'm not ready to be harrassed by the anti-choice people." (L-48) Another described the harassment she experienced: "One of the most difficult times that I had was when I arrived at the Clinic—only to be greeted by boisterous, uncaring and insensitive pro-life activists. These people taunted and harassed each individual who

While these letters do not constitute sworn testimony or record evidence, they do provide an invaluable source of information about the lives of women who choose to have an abortion. When abortion is examined in the context of women's lives, the constitutional foundations for a woman's right to decide "whether or not to terminate her pregnancy" become obvious. *Roe v. Wade*, 410 U.S. at 153. What also becomes clear is that this Court's decision in *Roe v. Wade* is firmly rooted in our nation's most fundamental traditions of personal integrity and human dignity.

## ARGUMENT

### I. *Roe v. Wade* Has Dramatically Improved The Lives And Health Of American Women And This Court Should Reaffirm It.

Approximately 1.5 million American women choose to have abortions each year. These women make this choice because they take their responsibilities to existing family members seriously; because they believe that they can escape from poverty; because they believe that an educa-

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went in." 131 Cong. Rec. H3588 (daily ed. May 22, 1985) (letter of Jane Doe). As of August 14, 1985, 145 incidents of clinic violence had been reported in 1985 alone. National Abortion Federation, Summary of Clinic Violence As Reported to N.A.F. (1985). The violence and harassment have been so severe that courts have issued injunctions and restraining orders against individuals engaging in activities that interfere with access to and the use of private property for the provision of abortion services. *See, e.g., Northern Virginia Women's Medical Center v. Balch*, 617 F.2d 1045 (4th Cir. 1980) (trespass upon clinic facility and immediately surrounding property); *Feminist Women's Health Center v. Women Exploited by Abortion*, No. 83-2-04152-8 (Wash. Super. Ct., Snohomish Cty. 1984) (formation of a "gauntlet" which patients must cross, recording patients' license plates, video-taping and photographing patients); and *Parkmed Co. v. Pro-Life Counseling, Inc.*, 88 A.D. 2d 534, 450 N.Y.S. 2d 23 (1982) (physical and verbal abuse, harassment, intimidation and assault of clinic patients and employees and property damage). For additional cases, see Reproductive Freedom Project of the ACLUF, *Legal Docket* (L. Soto ed. 1984).

tion is important; because they believe that they have talents and skills to offer the world; because they believe that someday they will find the right man to marry and raise a family with; and because they have hopes and dreams of better lives for themselves and those they love. The reasons why women choose abortion are numerous, personal and profound. This Court's decision in *Roe v. Wade* has preserved to women the right to make these critical and highly personal decisions.

In his brief, the Solicitor General asks this Court to overrule *Roe v. Wade* and "return the law to the condition in which it was before that case was decided." Brief for the United States as *Amicus Curiae* in Support of Appellants, at 24 ("S.G. Br."). The condition of the law determines the condition of women's lives. The condition to which the Solicitor General would return us is one in which hundreds of women will die each year from illegal abortions and thousands will have to risk their lives or be forced to endure unwanted pregnancies.

Before this Court's decision in *Roe v. Wade*, state governments were free to substitute their political judgments for the personal, moral judgments of women and the medical judgments of doctors. Despite the laws that prohibited or restricted abortion, women made decisions about their reproductive lives, and obtained the abortions they needed and wanted. *See* W. Hern, *Abortion Practice* 17-20 (1984). *See also* M. Potts, P. Diggory, & J. Peel, *Abortion* 87-89 (1977). Women obtained illegal abortions despite the illegality and grave risks involved, as these excerpts from the letters reveal:

> I remember Tijuana. I remember bugs crawling on walls as I waited for the "second part" of my abortion to take place. The first part was done in comparatively clean surroundings—"a clinic"—but I was too far along for the abortion to be done in one procedure, so I was sent to a "hotel" to wait three hours—a stinking cesspool of urine, sweat, filthy sheets and bugs—unidentifiable crawling creatures

all over the walls, floors and crevices. . . . Where else could I have gone in 1963? A name from a hairdresser passed through the underground grapevine by other desperate women seeking a life of dignity and choice. (L-1)

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I think the thing I will always remember most vividly was walking up three flights of darkened stairs and down that pitchy corridor and knocking at the door at the end of it, not knowing what lie behind it, not knowing whether I would ever walk back down those stairs again. More than the incredible filth of the place, and my fear on seeing it that I would surely become infected; more than the fact that the man was an alcoholic, that he was drinking throughout the procedure, a whiskey glass in one hand, a sharp instrument in the other; more than the indescribable pain, the most intense pain I have ever been subject to; more than the humiliation of being told, "You can take your pants down now, but you shoulda'—ha!ha!.—kept 'em on before;" more than the degradation of being asked to perform a deviate sex act after he had aborted me (he offered me 20 of my 1000 bucks back for a "quick blow job"); more than the hemorhaging and the peritonitus and the hospitalization that followed; more even than the gut-twisting fear of being "found out" and locked away for perhaps 20 years; more than all of these things, those pitchy stairs and that dank, dark hallway and the door at the end of it stay with me and chills my blood still.

Because I saw in that darkness the clear and distinct possibility that at the age of 23 I might very well be taking the last walk of my life; that I might never again see my two children, or my husband, or anything else of this world. (L-2)

Or, women found ways to obtain a legal abortion despite the restrictions, the delay and the subterfuge involved:

> Having an abortion in Illinois in 1957 was a demeaning experience. I had to lie, two doctors who did not know me had to lie, and my own doctor had to lie. Such were the laws in that time and at that place. No matter that I had had a miscarriage one month previously, and my uterus looked like chopped liver, and I was in a great deal of pain; we still had to go through this hypocritical process to enable me to have my own doctor, at the hospital of my choice. (L-3)

Estimates of illegally induced abortions in the United States in the 1960's ranged between 200,000 and 1,200,000 a year. Cates, *Legal Abortion: The Public Health Record*, 215 Science 1586 (1982). Illegal abortions caused large numbers of deaths. In 1965, for example, 235 or 20 percent of all deaths related to pregnancy and childbirth were attributed to abortion. *Id.* Thus, many women who obtained illegal abortions did not survive:

> On November 18, 1971, my twin sister Rose Elizabeth, died from an illegal abortion. This was after a very brutal rape . . . The traumas of being raped and pregnant, knowing she would die if she didn't have an abortion, the embarrassment, the pain, the guilt. She called a close friend who knew of a person who would do the abortion. She decided to wait until we all had left for church, then called her friend to pick her up, (I can still remember opening the door of that old half abandoned building, and seeing her laid out on the table bleeding to death.) She never made it out alive . . . For this reason I speak out today, for I believe if there had been a place where women, especially young women, could have gone for an abortion, where the environment was safe and clean, Rose Elizabeth, would still be with us today. (L-4)

Those women who did survive their abortion were likely to suffer complications: [3]

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[3] "Illegal abortions performed by unskilled practitioners in unsafe settings had complication rates much higher than legal abortion

> Becoming pregnant just two months after the birth of her first child, [my mother] was not well recovered from this experience. Her doctor was concerned for her health, but in 1940 there were no options. She and my father chose to abort this child, fearful her health was too fragile to manage another pregnancy so soon. Done by a backstreet butcher, the abortion put my mother's life in jeopardy and led to complications which nearly killed her during her pregnancy with me a few months later. She and I were in the hospital for 21 days following my birth and her health was permanently ruined. She underwent a hysterectomy by the age of 30 and has had two spinal fusions to attempt to repair the damage done to her body because of her pregnancies. (L-5)

Some women who did not or could not obtain abortions resorted to suicide:

> This is not a letter about an abortion. I wish it were. Instead, it is about an incident which took place over forty years ago in a small mid-western town on the bank of the original "Old Mill Stream". One night a young girl jumped off the railroad bridge to be drowned in that river. I will always remember the town coming alive with gossip over the fact that she was pregnant and unmarried. . . I could imagine the young girl's despair as she made her decision to end her life rather than face the stigma of giving illegitimate birth. . . I still grieve for the girl. (L-6)

Laws prohibiting abortion forced women to undertake the significantly greater risks of pregnancy and child-

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today. Because the number of illegal abortions performed in a given locale was unknown, case-series reports of complications do not allow calculation of complication rates. Sepsis . . . was a major problem that has virtually disappeared today. Complications were related to ineffective or unsafe methods, ranging from oral ingestion of turpentine, bleach or quinine to insertion of foreign bodies into the uterus." Tyrer, *Abortion in the U.S.: Past, Present, and Future?*, PPFA Medical Digest: Issues in Reproductive Health 3 (Spring 1982) (footnotes omitted).

birth. *See Roe*, 410 U.S. at 149, 163.[4] Some women died as a result of pregnancy or childbirth and others came close to death because of restrictive abortion laws:

> Early in her pregnancy, she began experiencing some bleeding and was treated by her doctor and sent home. Patricia seemed to be pregnant; she was also tired and not feeling well. Then, about two months later, she began bleeding again and was carefully attended by her doctor. Within five days she was in excruciating pain which her doctor diagnosed as peritonitis. Although her doctor said he had never been able to detect any fetal development, Patricia had to wait for further tests to be completed to show that there was no viable fetus. Then, her doctor could legally perform a D & C and remove the remains of a fetus that had been dead several months. The anti-abortion laws of the time nearly cost Patricia her life and did cause her months of pain and inconvenience for her young family. (L-7)

Without access to legal abortions, women were forced to undergo not only the physical burdens and risks, but also the pain and indignity of unwanted pregnancies:[5]

> I am a fifty-three-year-old librarian—middle class, Unitarian—and to all who know me, the mother of two. In fact, I am a mother of three, having had a child out of wedlock which, until recently, I have

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[4] Legal abortion is safer than pregnancy through at least the first 16 weeks of pregnancy. And for pregnant teenagers "abortion is at least five times safer with respect to survival than term pregnancy." Hern, *supra*, at 26. "In 1978, the overall death-to-case rate for legally induced abortions fell to 0.5 per 100,000 abortions, whereas the death-to-case rate for term delivery resulting in live birth, excluding abortion and not including deaths due to ectopic pregnancy, molar pregnancy, and fetal deaths, was 8 per 100,000 live births, making the risk of death due to pregnancy 16 times greater than the risk of death due to abortion." *Id.* at 24.

[5] *See* Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569, 1579-80 (1979) for an excellent summary of the physical burdens of pregnancy.

never felt able to mention to anyone for over thirty years. The fear, pain and powerlessness of an unsanctioned pregnancy, and the immeasurable anguish to living the remainder of one's life knowing somewhere there is a child irrevocably lost to you, is an experience no woman should have to undergo. When I remember—and believe me, this is something one never forgets—my devastated father weeping over the news, the subterfuge and strategy involved in spiriting me out of sight, the lonely wait in a strange city, and the birth alone amongst strangers, completely devoid of the joy which should rightly accompany this event, the pressure to relinquish my daughter for adoption, then the time of agonizing readjustment, which phased into acceptance but left a never-totally assuaged sense of loss. . . . As a nineteen-year-old college freshman in 1951, I would have given anything imaginable to have had access to legal abortion—to have spared my parent (and I was fortunate in having a loving, supportive one) the hurt this event caused him, and to have spared myself the incalculable emotional pain and the subtle ways in which my life was altered forever. (L-8)

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When I was only 16 years old, in 1968, I found myself faced with an unplanned and an untimely pregnancy. Abortions were illegal at that time and I did not have the money or resources to know how to go about getting one way or any other way. When I finally got up the nerve to tell my parents I was almost 4 months into the pregnancy. It was at this time that I felt the impending doom of my situation. I was forced to carry the pregnancy to term. During my pregnancy I was treated like a baby machine —an incubator without feelings—who was to produce this child for adoption for another couple who could not have children, for whatever reasons. (L-9)

Today, because of this Court's decision in *Roe v. Wade*, most women have access to safe and legal abortions.[6] Once legalized, abortion became one of the safest surgical procedures performed, as well as one of the most studied and best understood. *See* Cates, 215 Science, at 1586; Hern, *supra*, at 23-34.[7] In the ten years following *Roe*, the replacement of unintended births and illegal abortions by legal abortions has averted perhaps 1,500 pregnancy-related deaths and several tens of thousands of life threatening complications. Tietze, *The Public Health Effects of Legal Abortion in the United States*, 16 Family Planning Perspectives 26 (1984). The differences between seeking an illegal abortion before *Roe* and a legal one after *Roe* are dramatic:

> I am 38 years old and have had 2 abortions—1 legal, 1 illegal. My first was when I was 19 years

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[6] However, many instances exist where women, either poor, young, or from rural areas, do not have access to safe and legal abortion services. These women face conditions not unlike those prior to *Roe v. Wade*. Due to the public funding cutoffs from the Federal government and 35 states, poor women face a delay of two to three weeks, the time needed to acquire adequate funds, in obtaining an abortion. This delay causes some poor women to face riskier second, instead of first trimester abortions. Poor women may also sacrifice current living expenses for abortion services. Henshaw & Wallisch, *The Medicaid Cutoff and Abortion Services for the Poor*, 16 Family Planning Perspectives 170 (1984). *See also* R. Petchesky, *Abortion and Woman's Choice*, 155-61 (1984). Teenagers face "a serious, and in some cases insurmountable barrier" to abortions in states with parental consent or notification laws, especially teens in rural areas. Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Family Planning Perspectives 259 (1983). Seventy-four percent of all non-metropolitan women live in counties that have no abortion facilities. Henshaw, Forest and Blaine, *Abortion Services in the United States 1981 and 1982*, 16 Family Planning Perspectives 119, 122-23 (1984).

[7] Abortion procedures have "half the risk of death associated with tonsillectomy and one one-hundredth the risk of death associated with appendectomy." Hern, *supra*, at 23-24.

> old. It was illegal. I had to drive from north Jersey to Philadelphia for what I understand now was an ineffective treatment by a doctor who sexually abused me while supposedly giving me injections to induce a miscarriage. After a week of treatments (64 injections a day) he used a scalpel to rupture the opening of my uterus. I miscarried later that day. I was too frightened to go to the doctor and developed peritonitus. I almost died.
>
> My second abortion was legal. When I discovered I was pregnant, I went to my doctor, who, with much concern and sympathy, told me of all alternatives, including adoption. We both decided abortion would be best. The procedure was done in a hospital—it took three hours and I was back to work the next week. There was no trauma, other than the difficulty of making a decision that is always hard to make. (L-10)[8]

Overturning *Roe v. Wade* would cause grave damage to women's health and lives. If *Roe* were overturned and abortion prohibited or restricted, it is estimated that approximately 200 women would die each year from complications from abortions. Tyrer, *supra*, at 4. Experience in countries whose governments repealed liberal

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[8] There are many reasons why a woman would have more than one abortion. For example, the author of the letter quoted above explains:

> By the way—I am allergic to rubber and the contraceptive creams and jellies. I cannot take birth control pills and rejected an IUD. I am as careful as I can be but the only alternative my husband and I now see is sterilization. (L-10)

Another author writes:

> I have had two abortions and in each case I felt the decision was the most loving one I could make for myself, the unborn child, our family and the larger community. The first decision was made because I had contracted measles shortly after conception. My husband and I already had four children . . . The second abortion decision was made because of failed contraception. (L-11)

abortion laws indicates that women continue to obtain abortions and that there is an increase in the number of deaths due to the dangers of illegal abortions.[9] If a woman's right to choose to have an abortion is not constitutionally protected, states might pass laws that are even more stringent than those that existed before this Court's decision in *Roe v. Wade*.[10] For example, states which once allowed abortions for pregnancies that threatened the life or health of the mother might not include these exceptions and women and doctors might be prosecuted for violating laws prohibiting or restricting abor-

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[9] The experience in Romania should be instructive for the United States. From 1957 until 1966 Romania had a liberal abortion law; subsequently access to abortion services and contraceptives was restricted. Initially the birth rate nearly doubled and the abortion ratio (to 1000 live births) fell over 90%. David, *The Romanian Abortion Experience: New Data*, Intercom 7 (Sept. 1980). However, the abortion rate since 1966 increased steadily, representing spontaneous and induced abortions under all circumstances. Concurrently, deaths to women from abortion rose dramatically, implying a steady increase in non-medically-induced abortions. Huber, *Restricting or Prohibiting Abortion by Constitutional Amendment: Some Health Implications*, 27 Journal of Reproductive Medicine 729, 733 (1982). The abortion ratio continues to steadily rise from 390 (1967) to 1300 (1983). *Monitoring to Prevent Abortion in Romania*, Population Today 8 (June 1984). *See also*, Potts, Diggory, and Peel, *supra*, at 143-46.

[10] The Helms-Hogan constitutional amendment to overturn *Roe v. Wade* would have prohibited abortions, even those which save the life of the woman. Pilpel, *The Fetus as Person: Possible Legal Consequences of the Hogan-Helms Amendment*, 6 Family Planning Perspectives 6 (1974). Over 45 bills proposing constitutional amendments to prohibit abortion have been introduced in Congress since 1973. Seventeen were introduced in the first three months of 1981 alone. Huber, *supra*, at 730. One sponsor, "Sen. Hatch has stated publicly on numerous occasions that if his amendment is adopted he would be 'among those seeking the most restrictive state and federal laws with respect to abortion'." The Alan Guttmacher Institute, *The Hatch Amendment: Abusing the Process, Invading Privacy*, 2 Issues in Brief 1, 2 (1982).

tion more vigorously than before this Court's decision in *Roe v. Wade*. Huber, *supra*, at 732-33.[11]

No sound reasons exist for this Court to overturn *Roe v. Wade* and put in jeopardy the lives and health of American women. By allowing women to make critical personal decisions regarding pregnancy and childbirth and by allowing health care providers to deliver the best possible abortion services, this Court struck the appropriate balance between state and individual interests. Measured against the dramatic improvement that legalized abortion has brought to American women, *Roe v. Wade* is anything but "flawed." S.G. Br. at 2, 24.

## II. To "Return The Law To The Condition" Before *Roe* Would Deny Women Their Fundamental Constitutional Rights.

The Constitutional basis for *Roe v. Wade* is found in the personal liberty guranteed by the Fourteenth Amend-

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[11] Enforcement of laws prohibiting abortion, like laws prohibiting the use of contraceptives, would be "virtually impossible without the most outrageous sort of governmental prying into the privacy of the home." Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 930 (1973) (emphasis omitted). In the absence of legal abortions women will perform self-abortions in their homes and in their bedrooms:

> On Saturday night [my husband] went out to get some gas for his old car. I decided to abort myself. I cleaned a 14-inch knitting needle with alcohol, lay on my bed, prayed and slowly inserted it into myself. I knew I could die if I pierced my womb and bled and/or became infected. I felt I had to risk it. As I drew out the needle there was a little blood on it and I was very afraid. I will always remember that red fluid on the end of that shiny blue needle . . .(L-47)

If *Roe v. Wade* was overturned even more outrageous intrusions might be permitted. In Romania, for example, where liberal abortion laws were repealed, the government announced a program which includes mandatory medical screening of women in their 20's for pregnancy and monitoring of pregnant women to ensure the pregnancy continues. The government stated that miscarriages would be investigated, and any illegal abortions would result in prison terms for both the woman and the physician. *Monitoring to Prevent Abortion In Romania*, Population Today, at 8.

ment, in the Bill of Rights and its penumbras, and is manifest in the stories of American women trying to lead meaningful, responsible, and caring lives. In *Roe v. Wade* this Court held that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. This decision stands on the long-recognized and essential element of personal liberty—an "individual's 'freedom of personal choice in matters of marriage and family life'." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 (1983).[12] The right to choose to have an abortion is so personal and so essential to women's lives and well-being that without this right women cannot exercise other fundamental rights and liberties guaranteed by the Constitution.

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[12] The Solicitor General dismisses personal liberty as a constitutional foundation for *Roe v. Wade* and argues that the right to choose rests on nothing more than "conviction" that is "at best intuition based in controversial moral and social theories of the good life and of an individual's situation in society . . ." S.G. Br. at 29. When taken out of context many constitutionally protected activities seem to rest on little more than "theories of the good life": watching movies at home, *Stanley v. Georgia*, 394 U.S. 557 (1969); drinking 3.2 beer, *Craig v. Boren*, 429 U.S 190 (1976); attending private school, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); living with grandchildren, *Moore v. East Cleveland*, 431 U.S. 494 (1977); wearing a particular jacket, *Cohen v. California*, 403 U.S. 15 (1971); attending a particular college, *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); working in the laundry business, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); studying a foreign language, *Meyer v. Nebraska*, 262 U.S. 390 (1923); strolling on a neighborhood street, *Kolendar v. Lawson*, 461 U.S. 352 (1983). When placed in context and given careful consideration, these activities which "'may seem at first blush . . . inconsequential" turn out to raise significant constitutional questions. *Cohen v. California*, 403 U.S. at 15. This is so, of course, because the Constitution protects more than life as mere physical existence. The Constitution protects the liberty to live a meaningful and fulfilling life.

The rights to privacy and personal liberty have been explicitly recognized to include the right to use contraceptives. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See also Carey v. Population Services International*, 431 U.S. 678 (1977). Women are fertile from, approximately, the age of 15 to 45. Hern, *supra*, at 2-3. Most women will spend the majority of these 30 years trying not to get pregnant. The Alan Guttmacher Institute, *Choosing A Birth Control Method That's Right For You*, at 2. But no contraceptives are one hundred percent safe and effective [13] and they often fail despite conscientious use:

> I was a married woman using the birth control methods available at the time; a diaphragm and a spermicide jelly. My first child was planned and I was very happy. Slightly more than two years later I had another planned child. Then I found myself pregnant with a child that would be only 17 months younger than the second child. I had used my birth control methods assiduously but to no avail. I accepted the fact of that child and loved it. Then I got pregnant again. This one would be only 13 months younger than the third child. I was faced with the unpleasant fact that I could not stop the babies from coming no matter what I did . . . [The abortion] was a tremendous relief and I have never regretted it. My husband then had a vasectomy and our sex life was immensely improved. You cannot possibly know what it is like to be the helpless pawn of nature. I am a 71 year old widow. (L-12)

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[13] Petchesky, *supra*, at 182. Moreover, the development of a completely safe and one hundred percent effective contraceptive is practically impossible given the inherent danger of contraceptive technologies to women's bodies. *Id.* at 189-90. The lowest possible risk to women's health is experienced by women using barrier methods of contraception backed up by early abortion to terminate pregnancies from method-failure. Tietze, *New Estimates of Mortality Associated with Fertility Control*, 9 Family Planning Perspectives 74, 76 (1977).

> My attitude about abortion changed dramatically when, with my third child, then six, in school full time, my business booming, and my own college career proving exceedingly fulfilling, I suddenly began experiencing signs of pregnancy. At this time my husband and I had a birth control agenda more complex than a NASA countdown, so I was both puzzled and anguished by the failure of the most effective contraceptive technology ever devised. (L-13)

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> My husband and I take our responsibility to our children and any potential children seriously. I take no chance with my contraception except its own failure rate. And any of them can fail. I hunger for a time when this will stop, when we can know and not simply assume that our plans to prevent conception will work. But until that time we must have the right to choose, either to abort or to give birth. Without that choice we love in the shadow of fear. (L-14)

Because contraceptives fail, and because they are not always available or possible to use, abortion is necessary if people are to be able to determine whether and when to "bear or beget a child." *Eisenstadt*, 405 U.S. at 453.[14]

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[14] Sometimes contraceptive use before intercourse is impossible, as in situations of rape and incest. Some women do not use contraceptives, in particular the pill and IUD, based on their knowledge of the risks to life and health associated with usage. Petchesky, *supra*, at 182-88. Other times ignorance and societal pressures account for the failure to use contraception, especially among teens. As one letter writer explained, "I got pregnant when I was 14. I didn't even know I had engaged in 'the' sexual act." (L-17) *See also* Jones, *et al.*, *Teenage Pregnancy in Developed Countries: Determinants and Policy Implications*, 17 Family Planning Perspectives 53 (1985). Access to contraceptives is restricted, especially for teenage and poor women, because of the cost and state regulation of advertising and access. H. Ory, J. Forrest, and R. Lincoln, *Making Choices: Evaluating the Health Risks and Benefits of Birth Control Methods*, 21, 25 (1983). Furthermore, "[a]lmost all women who were not using a method of contraception

Individuals and couples choose the alternative of abortion so they can start or expand their families when they feel most ready and able to care for them. The following letters illustrate how important the right to choose to have an abortion is to those who are or intend to be parents:

> . . . We write together because abortion affects the lives of men and women . . . Our decision was not a difficult one. It was not an agonizing one or a resolution of ambivalence. In contrast our decision was a clear one. We were not ready to have a child . . . Six years later our daughter, now almost three, was willfully conceived. It is difficult to adequately describe the difference between a wanted and an unwanted pregnancy. It is sometimes like the difference between darkness and despair, and light and joy. We were ecstatic. The absolute joy we experience through our daughter comes in large part because we were ready to become parents. She has certainly been worth waiting for. (L-15)

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> Now, I am proud to say, I am 6 months pregnant and very excited. We are both looking forward to a child, confident that we are up to meeting this challenge. Things are so different than 5 years ago—now this child will be a wanted child and will come into a loving family waiting for it with open arms. Now we are both ready to give our lives to this new being—before we would have felt robbed. (L-16)

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> I am and will forever be grateful that safe and legal abortion was available for both my daughters. Each had a time when she needed to have that choice open to her.

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before an abortion use one after an abortion." The Alan Guttmacher Institute, *Responses to Concerns Raised About Abortion*, 3 Issues in Brief 1, 2 (1983). *See also* Westoff, *et al., Abortions Preventable by Contraceptive Practice*, 13 Family Planning Perspectives 218, 221 Table 3 (1981) (96.8% of women having an abortion use some form of contraceptive after the procedure).

> Each found herself pregnant at a time when it seemed she may not have had the resources to raise a child to a compassionate, responsible adulthood. . .
>
> One daughter did much soul-searching and exploration of options, possibilities and consequences in making her decision. She decided not to have the child. It was a good decision. Her health and the conditions of her life have been such that it would have been tragic for a child. She was at a point in her life where she did not have the strength to give what a baby and growing child needs; nor even to go through a pregnancy.
>
> My other daughter also considered very deeply what having a child at that point in her life meant. Having the choice of ending the unplanned pregnancy gave her and her husband the opportunity to think through together what becoming parents needs to mean. They made a conscious commitment to raising that child. Their decision has turned out to be right for all concerned. June 5 will be that beautiful child's seventh birthday. (L-18)

The excerpts from the letters illustrate that the right to choose to have an abortion is also an indispensable part of other liberty interests recognized by this Court. This Court has stated that the right to "[l]iberty means more than freedom from servitude, and the constitutional guarantee is an assurance that citizens shall be protected in the right to use [their] powers of mind and body in any lawful calling." *Smith v. Texas*, 233 U.S. 630, 636 (1914).

One of this Court's most eloquent explications of the right to liberty is in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), where this Court stated:

> Without doubt [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship

> God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Without the right to choose abortion the Fourteenth Amendment's guarantee of liberty has little meaning for women. With the right to choose abortion, women are able to enjoy, like men, the right to fully use the powers of their minds and bodies. This becomes clear when people reveal why they choose to have an abortion. These reasons correspond to the very same rights and freedoms celebrated in *Meyer*.

*"To engage in any of the common occupations of life"*: [15]

The following letters reveal that women choose to have an abortion because pregnancy and childbirth can prevent them from keeping their jobs, from feeding their families and from serving others in ways they consider necessary and appropriate.

> My job on the assembly line at the plant was going well and I needed that job desperately to support the kids. Also I had started night school to improve my chances to get a better job. I just couldn't have another baby—5 kids were enough for me to support.
>
> I felt badly for a day or two after the abortion. I didn't like the idea of having to go thru with it. But it was the right thing for me to do. If I had had the baby I would have had to quit my job and go on welfare. Instead I was able to make ends meet and get the kids thru school. (L-19)

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> Thirty years later I feel that I made the right choice in having an illegal abortion. I was able to pursue a useful and rewarding career in the service of my country that would not have been possible, if I had born a child. (L-20)

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[15] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

> To this day I am profoundly grateful for having been able to have a safe abortion. To this day I am not a mother, which has been my choice. I have been safe and lucky in not becoming pregnant again. I love people and work in a helping profession which gives me much satisfaction. (L-21)

*"To acquire useful knowledge"*: [16]

Pregnancy and childbirth may determine whether a woman ever gets to start or complete her education, which in turn will significantly influence her ability to support herself and her family.

> Being a mother is hard at any age but being a teenager makes it harder . . . Things I may have wanted to do before getting pregnant, like college and a career are different now. Before I think about my dreams, I have to think about taking care of a baby . . . I could be making plans for my future, but instead I'm making plans for my baby's future. (*Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. (May 7, 1985) (Statement of Monica Woodruff). (L-45)

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> I am a junior in college and am putting myself through because my father has been unemployed and my mother barely makes enough to support the rest of the family. I have promised to help put my brother through when I graduate next year and its his turn. I was using a diaphragm for birth control but I got pregnant anyhow. There is no way I could continue this pregnancy because of my responsibilities to my family. I never wanted to be pregnant and if abortion were not legal I would do one on myself. (L-22)

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> I had completed one year of a two year X-ray technician program when I discovered I was preg-

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[16] *Id.*

> nant. I was 20 years old, the year was 1971, and abortion was illegal. I wanted to finish my training and I knew that I did not want a child. (L-23)

*"To Marry"*: [17]

Women choose to have an abortion because they want to wait until they can marry for sound, loving reasons.

> I had an abortion in 1949 because I could not go through with a loveless marriage for the sake of a child I did not want. . . . The benefits were incalculable. I was able to terminate the pregnancy, to complete my education, start a professional career, and, three years later marry a man I did love. We subsequently had three beautiful children by choice, children who were welcomed with joy, cherished always, and raised with deep pleasure because we attained economic security and the maturity necessary to provide properly for them. (L-29)

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> I am now 28, a registered Professional Engineer in California, and still with the same man I was 6 years ago. In many ways, the abortion brought us closer together; whereas an unwanted child would have forced us together unwillingly or driven us apart. . . . (L-31)

*To "establish a home and bring up children"*: [18]

The availability of abortion makes it possible for people not only to choose the number of children they want, but also to create the kind of family life they have envisioned for themselves, to meet their responsibilities to already existing family members, and to raise their children according to their values. *Cf. Moore v. East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Prince v. Massachusetts*, 321 U.S. 158 (1944).

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[17] *Id.*

[18] *Id.*

When I found out I was pregnant, quite a few years ago, I had my two boys to care for, and Norma, a baby girl. I already had all that I could handle, because my third child, our daughter was a spina bifida baby, and I had made a promise to myself, when she was born with this condition, that I would take care of her until the end. I knew that such a baby will live two or three years at the most [19] and I had a choice: I could place Norma in a hospital, or I could take care of her at home. I felt I owed it to my special baby to see she had the care she needed. . . . If I had not had that abortion, I would have been pregnant at the time I buried Norma, and I think I would have gone to pieces . . . I did not believe that it was God's intention that I should have a fourth child, because I knew that it would break me and my family too. (L-26)

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As for adoption, I very much respect those women having gone that route. It is truly a selfless act of love. But for myself, I knew if I was to have a baby, I would want to keep it. Envisioning what my life would be, an unskilled, unwed mother, my child would not have two parents but one working parent. That's not the life I wanted to give my child and not what I wanted myself . . . Now almost ten years after, I am married and a full-time mother of two. When we first heard my son's fetal heartbeat I cried tears of joy. Our children were wanted very much and my fantasy is now my life. (L-27)

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I am sole support of three children because my husband left three years ago with another woman. He does not pay child support and cannot be found to force him. I have a very hard time trying to do

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[19] It should be noted that "most [spina bifida babies] now survive and can anticipate meaningful lives." D. McLane, *Introduction to Spina Bifida* (1984).

it myself. I just got a new job that pays better, but I still don't have benefits yet. If I have another baby I'll have to go back on welfare and I hate to do that because it does not set a good example for kids. (L-28)

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Ten years ago when abortions were illegal I was in a situation that would seem unbelievable on a soap opera. My husband was about to go to Vietnam as a physician. I had three children under the age of five, my mother was dying of a brain tumor diagnosed the week that my husband got his orders, my father had been earlier diagnosed as having leukemia, and my younger sister was within a year of getting married. I consider myself capable of handling most situations but on top of this I found myself pregnant. My first obligation was to my husband and my children but I felt a strong obligation to my parents as well. I simply did not feel I could or should cope with another baby. I was thirty years old. (L-25)

*"To worship God according to the dictates of his own conscience"*: [20]

The decision to have an abortion often reflects or is motivated by religious or spiritual beliefs that place priority on service and conduct of life as values even higher than procreation.

Having an abortion seemed to be the most thoughtful and loving decision we could make, in fact, it seemed to be the only decision we could make which would still maintain our life goals and plans in helping serve others as we had hoped. I was a Christian then, as I am now, and constant prayer asking for guidance through peace is how I was able to feel that God guided me toward that decision, also. Since the abortion in 1977, I have helped hundreds of emotionally disturbed children, counseled twice as many parents about the loving ways of parenting, become

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[20] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

known as the expert in the field of counselling children and families traumatized by sexual abuse, and in 1979 I married a Pediatrician who has been a wonderful husband and father to our four year old boy and our seven month old boy in utero (due in August.) God has given me many blessings and much peace since 1977. . . . (L-32)

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I could not see carrying a child to term at my age, and then giving it up for adoption . . . Being Jewish, our teaching is that the child becomes a full-fledged person only when it takes the first breath. Until then it does not have "human" standing. I went with what I felt to be spiritually, morally, and economically just. (L-33)

*"And generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"*: [21]

This Court has stated that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraints or interference of others." *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891). If a woman cannot choose to terminate an unwanted pregnancy, she is denied the right to the "possession and control" of her own body.

Today I am a little more than two months pregnant. My husband and I are thrilled about it. Almost exactly a decade ago, however, I learned I was pregnant, and my response was diametrically opposite. I was sick in my heart and I thought I would kill myself. It was as if I had been told my body had been invaded with cancer. It seemed that very wrong. (L-34)

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[21] *Id.*

> It was not easy for me to write this letter, even though I am a Family Planning Professional and with all my knowledge of family planning; I was like any other woman who had an unintended pregnancy, I was terrified and felt as though my life was out of my control. (L-35)

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> I was furiously angry, dismayed, dismal, by turns. I could not justify an abortion on economic grounds, on grounds of insufficient competence or on any other of a multitude of what might be perceived as "legitimate" reasons. But I kept being struck by the ultimate unfairness of it all. I could not conceive of any event which would so profoundly impact upon any man. Surely my husband would experience some additional financial burden, and additional "fatherly" chores, but his whole future plan was not hostage to this unchosen, undesired event. Basically his life would remain the same progression of ordered events as before. (L-13)

The letters make plain that what is at stake is nothing less than a woman's right to control her life and her destiny:

> On the ride home from the clinic, the relief was enormous. I felt happy for the first time in weeks. I had a future again. I had my body back. (L-36)

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> Personally legal abortion allowed me the choice as a teenager living on a very poor Indian Reservation to finish growing up and make something of my life. (L-37)

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> I was not glad that I was faced with an unwanted, unplanned pregnancy, however I am glad that I made the decision to have an abortion. The experience was a very positive one for me. It helped me learn that I am a person and I can make independent decisions. Had I not had the abortion I would have probably ended up a single mother struggling for survival and

> dealing with a child that I was not ready for. Or trapped in a relationship with an abusive, uncaring man. I would have felt inadequate as a mother and a person. (L-38)

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> I cannot stress strongly enough how that one personal decision allowed me to control my life. (L-39)

As the excerpts from the letters make clear, the freedom to decide whether or not to terminate a pregnancy is intimately connected to a woman's ability to be a full and equal participant in this society. Without the right to choose to have an abortion, women are not free to make and carry out fundamental, life-shaping decisions about work, education, marriage, family, home, health, and happiness. In short, without the right to choose to have an abortion, women are denied their constitutional rights of privacy and personal liberty.

Recognizing the profoundly personal nature of the abortion decision, this Court restricted government intrusion into the intimate relations of husbands and wives, into the family and into the hearts and minds of American women struggling to lead lives of integrity and dignity. *Roe v. Wade*, 410 U.S. 113 (1973). This Court's decision in *Roe v. Wade* has dramatically improved the lives and health of American women and protected a right that is both fundamental and indispensable to women's ability to lead full and meaningful lives.

## CONCLUSION

For the foregoing reasons, this Court should reaffirm *Roe v. Wade* and affirm the orders of the U.S. Court of Appeals for the Third Circuit in *Thornburgh v. American College of Obstetricians and Gynecologists* and the U.S. Court of Appeals for the Seventh Circuit in *Diamond v. Charles*.

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